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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,
Respondent,
—against—
CIA. MAR. ADRA S.A.,
Respondent,
—against—
LIPSETT STEEL PRODUCTS, INC.,
Petitioner.

No. 550

CIA. MAR. ADRA S.A.,
Petitioner,
—against—
SAMUEL MOSLEY,
Respondent,
—against—
LIPSETT STEEL PRODUCTS, INC.,
Respondent.

BRIEF OF RESPONDENT SAMUEL MOSLEY IN OPPOSITION

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BRIEF OF RESPONDENT SAMUEL MOSLEY IN OPPOSITION

Question Presented as to the Respondent Mosley

Does the shipowner's obligation of seaworthiness to a longshoreman during loading require that the work-

ing place "be reasonably fit to permit [him] to perform his work with reasonable safety"?

Statement

Petitioner Lipsett contracted to load the Liberian ship TURMOIL with a cargo of steel scrap. In loading No. 5 'tween deck space a mound of scrap metal extending inboard about 3 feet from the square of the hatch was built up leaving just enough space for Lipsett to run its chute between the top of the mound and the bottom of the main deck hatch coaming which extended about 2 feet into the 'tween deck area. The chute utilizing the force of gravity loaded the 'tween deck area surrounding the mound section by section; it was supported, positioned and moved by the ship's gear on the main deck. A shore side crane reached over the top of No. 5 hatch and dumped scrap of various sizes and irregular shapes into the chute which was unable to accommodate all the scrap fed to it, some of the scrap overflowed its sides extending the height of the mound and its base; some pieces were of such size and shape that they could not pass through its mouth or the bottom. The chief officer refused to enter the 'tween deck area during the loading because it is "dangerous", the scrap "will fall off", "it goes around where they load", it "bounces" and "ricochets around". Thus scrap metal accumulated outside the area the chute was positioned to load.

It was Mosley's job to direct the positioning of the chute from the 'tween deck area and to remain there during loading to free the chute of large pieces of scrap which from time to time became stuck in it.

On the day Mosley was injured the after offshore corner was loaded first; the chute was then moved forward about 2 feet to load the adjacent area. After loading resumed the chute was obstructed by "a piece of transmission or the rear end of a car" which was too big to pass between the end of the chute and its supporting bridle. Mosely picked up an "improvised hook" 5 or 6 feet in length, ¾ of an inch thick, the tool used to remove stuck scrap, approached the side of the chute as its mouth or lip was tilted upward "over a deck littered with scrap, tried to secure an adequate footing but due to darkness could not see whether the scrap on which he was standing was firm or loose, reached upward and forward with an improvised hook, started to pull on a piece of scrap lodged in the narrow end of a tapered chute, and fell backwards when his footing gave way.", (MacMahon, D. J., p. 29*).

The scrap on which Mosley tried to secure an adequate footing was made up of pieces of scrap of irregular size and shape which made an unlevel surface; in fact "the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff." (MacMahon, D. J., p. 29). Mosley did not continue to pull on the struck piece with all his might as Petitioners assert; when the scrap under his feet gave way he had to hold onto the hook to support himself and when it came off the piece of scrap he fell.

Mosley did not have sufficient light to obtain the best footing the scrap metal offered. The Trial Judge

* The numerals following p. indicate the pages of Lipsett's Petition.

said, "We think the jury could reasonably have found that the lighting was so poor as to constitute an unseaworthy condition and the proximate cause of plaintiff's injuries. There was ample evidence that the daylight was all but blocked out of the hold by intense dust, the large intruding chute, the overhead magnet, and the high pile of scrap pyramided almost to the bottom of the coaming which framed the square of the hatch." (MacMahon, D. J., p. 29). Although Respondent Adra called the chief officer to prove that the ship had portable lighting equipment aboard and he entered No. 5 'tween deck area to check the stowage, he remained silent as to the condition of the light and did not refute plaitniff's testimony that he used a flashlight when there.

The Trial Judge charged the jury that there was no defect in the hook Mosley used and to remove it from there "thinking" in determining seaworthiness.

The case was tried and submitted to the jury on the premise that the factors complained of each contributed to the unseaworthiness of the working area. In a post-trial decision the Trial Judge said:

> "The jury could also have reasonably found that the chute was tapered too narrow at the bottom for the size of some of the pieces of scrap and therefore unfit for its intended purpose; that the deck was so cluttered that it was a hazardous floor for the task assigned to plaintiff; that the primary method of clearing the chute was itself unsafe; or that any of these factors—the darkness, the chute, the size of the lodged piece of scrap, the littered deck, the method of clearing the

chute—operated in combination, *Kray* v. *United States,* 123 F. 2d 1008, 1010 (2d Cir. 1941), to create an unseaworthy condition." (p. 29, 30).

Reasons for Denial of the Writ as to the Respondent Samuel Mosley

1. The shipowner's obligation of seaworthiness to a longshoreman during loading was properly charged by the Trial Court in conformity with principles pronounced by this Court.

The shipowner's obligation of seaworthiness was precisely tailored and cast in the definition and language pronounced by this Court in *Mitchell* v. *Trawler Racer, Inc.,* 362 U S 539, 550, when the Trial Court charged:

> "* * * The law requires that a ship with all its appliances and appurtenances be reasonably fit for their intended use. Now, the standard isn't perfection. The law doesn't require an accident-free ship, but it does require that the ship and all its appurtenances be reasonably fit for their intended use."

The Court then drew into focus the reasonable fitness of the working place for the work Mosley was required to perform in the light of all the surrounding circumstances by charging:

> "Specifically here the question which you have to decide is whether under all the circumstances the 'tween deck area was reasonably fit to permit the plaintiff to perform his work with reasonable safety. And here you have to take into considera-

tion all of the conditions then obtaining, the type of operation that was going on, the lighting conditions, the chute, the kind of chute it was, the condition of the deck."

* * * *

"But consider all the conditions and decide whether under all of those conditions that area was reasonably fit for the plaintiff to perform his work in the task assigned to him with reasonable safety."

* * * *

"On the other hand, if you find that it was unfit, that it was not reasonably fit and reasonably safe, then you should find that it was unseaworthy, * * *"

That charge has the approval of *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U S 355, 363, where a longshoreman recovered a judgment against the shipowner for negligence and the unseaworthiness of the working place during unloading; in considering the right of the shipowner to indemnification from the employing stevedore this Court sanctioned a jury charge which it said was vital to the issue before it, and fixed the stevedore's obligation to discharge the cargo in a reasonably safe and seaworthy manner [the source of the shipowner's liability] on "the totality of the circumstances".

Unseaworthiness does not rest solely on the unfitness of the ship, its gear and equipment, as Petitioners contend, but "might arise from any number of individualized circumstances" including "The method of loading her cargo or the manner of its stowage",

Morales v. *Galveston,* 370 U S 165, 170. *Gutierrez* v. *Waterman Steamship Corporation,* 373 U S 206, 213, which imposed unseaworthiness liability on the ship for the escape of beans on the dock from defective bags in which they were shipped, promulgated the same rule and stated that unseaworthiness "includes fitness for loading and unloading". The unloading itself may be proper and yet create a condtion of unfitness (slime and fish gurry on the ship's rail) which a jury may find an unseaworthy condition, *Mitchell* v. *Trawler Racer* (supra). Thus the scrap littered deck standing alone, without the proof that it was brought about by the hazardous loading method adopted and the inadequate chute, and that its hazards were increased by insufficient light, was sufficient to present a jury issue of reasonable fitness or seaworthiness. The reasonable fitness of the working place as a whole controls, for "In defining unseaworthiness", the "focus is upon the resulting condition of the ship," *Skibinski* v. *Waterman Steamship Corp.* (CA 2, 1966), 360 Fed. 2d. 539, 542. The shipowner's obligation of seaworthiness is designed to afford protection against "The risks themselves [which] arise from and are incident in fact to the service," *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 95. The decisions of this Court clearly establish that the seaworthiness doctrine protects the longshoreman from all the risks incident to his service of the ship except those which arise out of a working place "reasonably fit to permit [him] to perform his work with reasonable safety". Thus *Sieracki* at pages 95, 96 clearly equates the obligation of seaworthiness with that of a reasonably safe place in which to work as does *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 102. As this Court noted in *Michalic* v.

Cleveland Tankers, 364 U.S. 325, 327, 328, the only difference between the shipowner's obligation of seaworthiness and his obligation to provide a safe place in which to work under the Jones Act is that the exercise of "due care" will discharge the latter obligation but not the former; otherwise the factual basis of liability is the same.

2. The holding of the United States Court of Appeals for the Second Circuit, that the working place must "be reasonably fit to permit [the longshoreman] to perform his work with reasonable safety" is not in conflict with the holdings of other United States Courts of Appeals.

Petitioners do not cite a single case enunciating a contrary rule or condemning the principle of the holding below. *Arena* v. *Luckenbach S. S. Co.* (CA 1), 279 F.2d 186 turned on the "operational negligence" of the stevedore and the availability of proper equipment for loading; *McKnight* v. *N. M. Patterson & Sons* (CA 6), 286 F.2d 250, posed the question whether a shore based crane came within the warranty of seaworthiness; *Waldron* v. *Moore-McCormack Lines* (CA 2), 356 F.2d 247, involved an improvident order of a competent ship's officer; *Spann* v. *Lauritzen* (CA 3), 344 F.2d 204 raised the question of whether a longshoreman operating a shore based hopper used in unloading came within the warranty of seaworthiness; *Huff* v. *Matson Navigation Co.* (CA 9), 338 F.2d 205, presented a similar question; *Ballwanz* v. *Isthmian Lines, Inc.* (CA 4), 319 F.2d 457 involved the seaworthiness of a wire sling which was too stiff to hold a wooden spreader; *McQuiston* v. *Freighter & Tankers SS. Co.*

(CA 5), 327 F.2d 746, involved the size of shovels used in unloading; *Skibinski* v. *Waterman S. S. Corp.* (supra), involved the use of an "open mouth hook" when a suitable hook was available and impressed liability because of the resulting unsafe condition of the working place; *Radovich* v. *Cunard S. A. Co.* (CA 2), decided July 18, 1966, —— F.2d., —— involved the use of a single purchase fall or rope which was insufficient for the weight of a car, like *Arena, Skibinski* and *Waldron* the case raised the issue of whether "operational negligence" on the part of the longshoremen or seamen can create unseaworthiness. *Freitas* v. *Pacific Atlantic Steamship Company* (CA 9) 218 F.2d 562, 563, involved solely the unseaworthiness of a strongback and its locking device; dismissal was affirmed because there was no proof that the appliances were defective. *Kent* v. *Shell Oil Company* (CA 5), 286 F.2d 746, 752, decided that a barge and its appurtenances were not a causative factor when a truck driver sustained an injury on the dock during loading, that the tort being non-maritime came within the purview of the Louisiana Compensation Statute which denied recovery against a third party on any ground including unseaworthiness. The Court's language on unseaworthiness, which Petitioner Cia. Mar. Adra S. A. quotes, refers only to ship's gear as the case was based solely on skids alleged to be defective; though sound the language is dicta. *De Gioia* v. *United States Lines Company* (CA 2), 304 F.2d 421, 423-461, clearly stands for the principle proclaimed below, for it equates seaworthiness with a safe working place in deciding that a deck "strewn with a tangle of loose wire lashings, shackles, dunnage, and other objects" breached the stevedores' warranty of work-

manlike service and imposed on the shipowner the dual liability of unseaworthiness and an unsafe working place. *Cox* v. *Esso Shipping Company* (CA 5), 247 F.2d 629, 637, adopted by this Court in *Michalic* v. *Cleveland Tankers* (supra) decided that the shipowner's obligation to provide "reasonably suitable appliances", can be discharged by the exercise of due diligence in a Jones Act count but not in one grounded on unseaworthiness where the duty is absolute. Thus both obligations rest on the same basis of liability, but only Jones Act liability may be relieved by the exercise of due diligence. In *Cox* the trial judge did not make that distinction clear; below there was no such confusion for the cause was tried and properly submitted solely on the ground of unseaworthiness.

Whatever conflict some of these cases may have with one another or with principles proclaimed by this Court, not one of them is in conflict with the rule of this case.

Conclusion

For the reasons stated, a writ of certiorari should be denied.

Respectfully submitted,

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